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4-4.100 Civil Fraud Cases -- Contacts

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4-4.110 Civil Fraud Litigation

Civil statutory remedies available for fraud against the government are set forth in the False Claims Act, *as amended*, 31 U.S.C. § 3729 *et seq.*, the Anti-Kickback Enforcement Act, *as amended*, 41 U.S.C. §§ 51 to 58, 42 U.S.C. § 5157 (misapplication of disaster relief funds), 12 U.S.C. § 1715z-4a(a) to (e) (violation of HUD Multifamily regulatory Agreement), and section 5 of the Contract Disputes Act, 41 U.S.C. § 604. Common law actions for fraud, money paid under mistake, unjust enrichment, conversion, and/or breach of contract also should be pursued if applicable. The Fraud Section of the Commercial Litigation Branch has prepared a monograph on civil fraud litigation which has been distributed to all USAOs.

The False Claims Act allows private parties to file complaints on behalf of the United States. These are referred to as "qui tam suits." The Act requires that the qui tam complaint be served on the Attorney General and the United States Attorney for the district in which the complaint has been filed. Immediately after a qui tam complaint is received attorneys from the USAO and the Fraud Section should confer to ensure that both offices have received the complaint and to decide how the case will be handled.

The government is entitled to the fruits of an employee's dereliction, if there has been a betrayal of trust. *See United States v. Carter*, 217 U.S. 286 (1910). If an employee takes any gift, gratuity, or benefit in violation of his/her duty, accepts employment or acquires any interest adverse to his/her employer without a full disclosure, this is a betrayal of his/her trust and a breach of confidence for which the employee must account. *See United States v. Drumm*, 329 F.2d 109 (1st Cir. 1964); *United States v. Drisko*, 303 F. Supp. 858 (E.D. Va. 1969).

Civil sanctions against fraud should be vigorously enforced. Expeditious enforcement of civil sanctions should be undertaken to make the government whole, if possible, and to provide a strong deterrent to fraudulent conduct in similar circumstances. Such enforcement is important to the promotion of the highest ethical standards among those who have dealings with the government or who are employed by it. Flagrant frauds, justifying the initiation of suits for multiple damages and penalties under relevant statutes generally, should not be compromised for less than multiple damages and some forfeitures. *See* 28 C.F.R. Subpart Y and Appendix for current delegations of compromise authority to United States Attorneys. Criminal and civil fraud investigations by the FBI and other investigative agencies should be carried out concurrently, including investigations as to the extent of the government's damage. Care should be taken to utilize grand jury materials in connection with civil actions only pursuant to Fed. R. Crim. P. 6e. *See United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983). Review the Memorandum from the Attorney General dated July 28, 1997, regarding Coordination of Parallel Criminal, Civil, and Administrative Proceedings. Likewise, review the Memorandum from the Attorney General to All United States Attorneys dated July 16, 1986, regarding Coordination of Criminal & Civil Fraud, Waste & Abuse Proceedings.

4-4.120 Civil Penalties And Civil Monetary Forfeitures

Congress has provided by statute for a myriad of civil penalties and civil monetary forfeitures. Responsibility as to particular penalties and forfeitures may be assigned to one of several divisions in the Department of Justice, including the Criminal Division (Asset Forfeiture and Money Laundering), since such sanctions are often an alternative to criminal sanctions. Civil penalty and forfeiture cases, which are not specially assigned to other divisions, are generally assigned to the Commercial Litigation Branch of the Civil Division; in

a few instances, penalty cases may be assigned to the Federal Programs or Torts Branches of the Civil Division. Care should be taken to examine the statute under which the penalty or forfeiture is assessed to ascertain whether enforcement requires a trial de novo and whether any other special conditions attach. If a trial de novo is required, either party may demand a jury. See *Union Insurance Co. v. United States*, 73 U.S. 759 (1867). Some statutes may provide an administrative review procedure, with limited review in a court of competent jurisdiction. In such cases, a jury trial can be avoided if the procedure is properly structured. See, e.g., *Weir v. United States*, 310 F.2d 149 (8th Cir. 1962); *United States v. Sykes*, 310 F.2d 417 (5th Cir. 1962). Even in such cases, the courts will inquire as to whether the action taken was within the agency official's statutory authority, whether there was evidence before him/her in support of his/her determination to satisfy elementary standards of fairness and reasonableness. See *Lloyd Sabaudo Societa Anomina Per Azioni v. Elting*, 287 U.S. 329 (1932).

Courts may limit the imposition of statutory civil penalties as a violation of a defendant's constitutional rights. Penalties may be held to constitute a second punishment in violation of the Fifth Amendment's protection against double jeopardy, see *United States v. Halper*, 490 U.S. 435 (1989). A civil penalty imposed under the penalty provisions of the False Claims Act also may be held to be so large in comparison to the government's damages that it violates the excessive fines clause of the Eighth Amendment. See *Austin v. United States*, 509 U.S. 602 (1993); *United States v. Advanced Tool Co.*, 902 F. Supp. 1011 (W.D. Mo. 1995). In seeking civil monetary penalties or forfeitures, consideration should be given to challenges which may be raised based on either of these constitutional provisions.

4-4.200 Court of Federal Claims and Federal Circuit -- Contacts

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4-4.210 Court of Federal Claims

Commercial Litigation Branch attorneys handle virtually all non-tax cases in the United States Court of Federal Claims. United States Attorneys should be vigilant in moving to dismiss or transfer cases brought in the district court over which the Court of Federal Claims has exclusive jurisdiction. Reference should be made to *Bowen v. Massachusetts*, 487 U.S. 879, 910, n.48 (1988); *North Star Alaska v. United States*, 14 F.3d 36, 37 (9th Cir.), cert. denied, 114 S. Ct. 2706 (1994); *Transohio Savings Bank v. Director, Office of Thrift Savings*, 967 F.2d 598 (D.C. Cir. 1992). Reference should be made to the Civil Division Monograph entitled "Transfer of Cases to the Court of Federal Claims." For further discussion of Court of Federal Claims litigation see Civil Resource Manual at 47.

NOTE: Cases asserting implied warranties or indemnities arising out of contracts for government purchase of products made in conformity with Government specifications where those products' alleged toxicity caused personal injuries should be referred to the Environmental Torts staff of the Torts Branch. In addition, cases where government contractors seek to invoke indemnity provisions to be held harmless from environmental regulatory claims and tort claims should be referred to the same staff. See USAM 4-5.500.

4-4.220 Federal Circuit

Commercial Litigation Branch attorneys handle the majority of cases in the United States Court of Appeals for the Federal Circuit. The Federal Circuit possesses exclusive jurisdiction to entertain an appeal from a final decision of a district court if the jurisdiction of the district court is based "in whole or in part" on the Little Tucker Act. See 28 U.S.C. § 1295(a)(2); *United States v. Hohri*, 482 U.S. 64 (1987). Commercial Branch

attorneys also represent the United States and its agencies in appeals to the Federal Circuit from decisions of the boards of contract appeals, the Court of Federal Claims, the Merit Systems Protection Board, and the Court of International Trade. 28 U.S.C. § 1295.

4-4.300 Intellectual Property -- Contacts

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4-4.310 Intellectual Property -- Copyright Suits

The exclusive remedy of the owner of material protected by statutory copyright (17 U.S.C. § 101, *et seq.*) against unauthorized use by the government or its contractors is by suit against the United States in the Court of Federal Claims. 28 U.S.C. § 1498(b). The use by the contractor must have been with the authorization or consent of the government.

Suits for copyright infringement against the United States Postal Service may be brought in the district courts. *See* 39 U.S.C. § 409(a). Such suits are defended by the Department of Justice on behalf of the Postal Service. *See* 39 U.S.C. § 409(d). Any suit for copyright infringement brought against the government in a United States district court should be brought to the attention of the Commercial Litigation Branch. Such a suit will be handled or monitored by that Branch.

A suit for infringement of an unregistered copyright may be brought against a private party provided the Register of Copyrights is also named as a party defendant. *See* 17 U.S.C. § 411(b). Any such complaint should be immediately brought to the attention of the Commercial Litigation Branch and the General Counsel, Copyright Office, Washington, D.C. 20540. If the Register of Copyrights decides to appear and defend such suit, the litigation will be handled by the Commercial Litigation Branch or under its supervision.

4-4.320 Patent Suits

The exclusive remedy of the owner of a patented invention used or manufactured by or for the government without the permission of the owner is by suit against the United States in the Court of Federal Claims. *See* 28 U.S.C. § 1498(a). Such use or manufacture by a contractor for the United States must be with the authorization and consent of the United States. An authorization and consent clause is usually included in contracts issued by Department of Defense agencies.

The district courts have concurrent jurisdiction with the Court of Federal Claims when the use or manufacture by or for the United States arises out of the furnishing of equipment to foreign governments in connection with mutual security agreements (22 U.S.C. § 2356) or as the result of the imposition of an order requiring the invention to be kept secret for national security reasons. *See* 35 U.S.C. § 183.

By 39 U.S.C. § 409(a), the district courts are given original but not exclusive jurisdiction over all suits involving the United States Postal Service. Suits for patent infringement against the Postal Service are defended by the Department of Justice. *See* 39 U.S.C. § 409(d).

Any suit for patent infringement brought against the government in a United States district court should be brought to the attention of the Commercial Litigation Branch. Such a suit will be handled or monitored by that Branch.

4-4.330 Suits Involving Trademarks, Trade Secrets, or Technical Data

Suits may be brought from time to time charging the government with infringement of a trademark or with misappropriation of trade secrets or technical data. There is no express jurisdictional statute for such suits, and they may be brought in the district courts as either contract or tort actions. The district courts have, under 39 U.S.C. § 409(a), original jurisdiction of such suits involving the United States Postal Service; the Department of Justice defends on behalf of that Service. *See* 39 U.S.C. § 409(d).

Any suit brought against the government, involving trademarks, trade secrets, or technical data, should be brought to the attention of the Commercial Litigation Branch. Such suits will be handled or monitored by that Branch.

4-4.400 General Commercial Litigation -- Contacts

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4-4.410 Bankruptcy Proceedings; Claims in Bankruptcy

The United States is frequently a creditor in bankruptcy proceedings. Because of the technical rules which obtain in bankruptcy, and the short deadlines for action and appeals, United States Attorneys should take unusual care to see that no rights of the United States are lost by default. The three most frequently invoked types of bankruptcy proceedings are described in the Civil Resource Manual at 47.

See also the following outlines in the Civil Resource Manual

The Bankruptcy "Players"	Civil Resource Manual at 48.
Bankruptcy Jurisdiction and Sovereign Immunity	Civil Resource Manual at 49 et seq.
Bankruptcy and the Government as Regulator	Civil Resource Manual at 54 et seq.
Avoidance Powers	Civil Resource Manual at 57 et seq.
Executory Contracts in Bankruptcy	Civil Resource Manual at 59 et seq.
Claims in Bankruptcy	Civil Resource Manual at 62 et seq.

4-4.413 Plans of Reorganization as Compromises

The purpose of "chapter proceedings" is to work out a compromise or extension of indebtedness. Thus, a proposed plan under Chapters 11, 12, or 13 amounts to a compromise offer or request for extension, as the case may be. If the plan proposes payment of the government's claim over a longer period of time than was originally called for, but there will be no reduction in the amount of the government's claim, and no release of security is required, no compromise is deemed involved. In some instances, plans provide for a cash deposit to pay the government's claims in full. Such proposals do not require the Civil Division's approval as a compromise of the government's claims.

Proposed plans which call for the government to accept less than the full amount due it, or for the release or substitution of security, amount to compromise proposals, and should be processed as any other compromise offer. If the offeror insists on an answer before necessary financial data, proper recommendations, and clearances can be obtained, the United States Attorney should object to the plan. The amount that would be realized by the government in the event of liquidation is a relevant consideration in judging the adequacy of an offer of compromise by way of a plan. Plans which call for the government to accept stock in a debtor or successor

corporation in payment or partial payment of its claims, or which call for the government to accept a percentage of net profits, should be avoided.

4-4.414 Appellate Procedures in Bankruptcy

Appeals from all final judgments, orders and decrees of a bankruptcy court, as well as discretionary interlocutory appeals, are heard in the district court, 28 U.S.C. § 158(a) or before a bankruptcy appellate panel, 28 U.S.C. § 158(b). Appeals from decisions of a bankruptcy court are controlled by Part VIII, Federal Rules of Bankruptcy Procedure. See the "Who, What, When, Where, Why, and How" of Appeals in Bankruptcy Proceedings, Civil Resource Manual at 67-68.

In an appeal from the bankruptcy court, the district court sits as an appellate court. 28 U.S.C. § 1334(b). The district court may affirm, reverse, or modify the bankruptcy court's ruling or remand the case for further proceedings. Fed. R. Bankr. P. 8013.

For further information about appellate procedures in bankruptcy, see the Civil Resource Manual at 69.

4-4.420 Contracts

Affirmative government claims arising out of a contract subject to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601 *et seq.*, must be the subject of a contracting officer's decision. If no appeal of the contracting officer's decision is taken by the contractor either to an appropriate Board of Contract Appeals within 90 days, or to the United States Court of Federal Claims within one year, that decision is final and not subject to further review. In such circumstances, an affirmative CDA suit may be filed in a district court to reduce the decision to an enforceable judgment. *See generally*, Civil Division Monograph entitled "Affirmative Claims by the government under the Contract Disputes Act" (1985). The Commercial Litigation Branch should be contacted prior to a suit being filed. Defensive contract litigation is discussed at USAM 4-4.210.

Guidance on contract issues can be found in the Civil Resource Manual

The Contract Disputes Act	Civil Resource Manual at 70
Protest of Contract Awards	Civil Resource Manual at 71
Principles of Contract Interpretation	Civil Resource Manual at 72
Ambiguities	Civil Resource Manual at 73
Validity and Construction of Liquidated Damages Provisions	Civil Resource Manual at 74
Claims of Mistakes in Bids	Civil Resource Manual at 75
Nonappropriated Fund Instrumentality Claims	Civil Resource Manual at 76
Quasi-Contractual Claims	Civil Resource Manual at 77

4-4.430 Collections

A major responsibility of the Attorney General, the Civil Division, and the United States Attorneys is recovering sums owed the United States. Prompt action should be taken to collect such debts, including the filing of suits, obtaining judgments, and enforcing judgments. Prompt and effective action is necessary if debtors are to respect the government's ability and will to collect these debts and if the public is to have confidence in the institutions of government. Prompt and effective action is also important to avoid a statute of limitations barring a claim. *See* 28 C.F.R. § 0.171. It is important that agency referrals be screened to ensure compliance with the Federal Claims Collection Standards, the joint regulations promulgated to implement the Debt Collection Act. 31 U.S.C. §§ 3711 *et seq.* In particular, all referrals of money claims which come within the United States Attorneys' delegated authority up to \$1,000,000 should be made through the National Central Intake Facility.

Referrals beyond that amount should continue to be made directly to the Commercial Litigation Branch of the Civil Division.

An appropriate supersedeas bond should be required in every appeal by a defendant in a collection case. In no case should there be an assignment of any interest of the government in any money judgment, lien, or chose in action involved in any case or matter within the general jurisdiction of the Civil Division, without express approval from the Civil Division. Appropriate action should be taken to perfect judgment liens and to renew such liens before their expiration. In no event should a debtor be advised that a claim or judgment is being closed or inactivated. The Commercial Litigation Branch of the Civil Division should be consulted with respect to the collection of judgments against States and other governmental bodies. In such instance, pre-filing notice to the appropriate official is usually required as a matter of comity.

4-4.440 Conversion of Property Mortgaged to the Government

See Civil Resource Manual at 78.

4-4.450 Decedent's Estate

Guidance on decedent's estate issues can be found in the Civil Resource Manual

Decedent's Estate	Civil Resource Manual at 79
Devises and Bequests to the Government	Civil Resource Manual at 80
VA Escheat Claims	Civil Resource Manual at 81
VA Vesting Claims	Civil Resource Manual at 82

4-4.460 Grants -- Breach of Conditions

See Civil Resource Manual at 83.

4-4.470 Guaranty Agreements

See Civil Resource Manual at 84.

4-4.480 Medicare Overpayment Cases

See Civil Resource Manual at 85.

4-4.510 Sureties

See Civil Resource Manual at 86.

4-4.520 VA Loan Claims

See Civil Resource Manual at 87.

4-4.530 Warranties

See Civil Resource Manual at 88.

4-4.533 Warranty of Prior Endorsements on Checks

See Civil Resource Manual at 89.

4-4.540 Defense of Foreclosure, Quiet Title, and Partition Actions -- 28 U.S.C. § 2410

Section 2410 of Title 28 waives the government's immunity from suit in five types of action as to real and personal property on which the United States has a lien. The nature of the lien determines which unit of the Department may be looked to by the United States Attorney for support, coordination and supervision.

If the government's lien is for federal taxes, the Tax Division will supervise the case. If the government's lien is for a criminal fine or bond forfeiture, the Criminal Division supervises. If the government holds a non-tax, non-criminal lien, such as a mortgage, judgment lien, or other lien, the Commercial Litigation Branch of the Civil Division supervises. The Environment and Natural Resources Division (General Litigation Section) supervises the defense in any 2410 action involving eminent domain, partition or property over which the government owns or leases.

If the nature of the government's lien is not disclosed by the complaint, its nature should be ascertained by an informal inquiry to the plaintiff's attorney. If that fails, formal discovery should be used. 28 U.S.C. § 2410 requires that the interest of the United States be set forth in the complaint "with particularity." See *City Bank of Anchorage v. Eagleston*, 110 F. Supp. 429 (D. Alaska 1953).

4-4.541 Actions Not Within 28 U.S.C. § 2410

Section 2410 of title 28 does not apply if the plaintiff seeks an injunction, see *Shaw v. Rippel*, 224 F. Supp. 77 (E.D. Ill. 1963), or a money judgment. Such relief must be sought, if at all, under other statutes which waive the government's sovereign immunity. If the relief sought is foreclosure, 28 U.S.C. § 2410 requires that the plaintiff ask for a judicial sale. Such a sale is not required in the other four types of action permitted by 28 U.S.C. § 2410. If the interest of the United States is not a lien but rather a fee title or a leasehold, 28 U.S.C. § 2410 does not apply, but the plaintiff may be able to invoke 28 U.S.C. §§ 2409 or 2409a.

United States v. Brosnan, 363 U.S. 237 (1960), held that, in States which permit nonjudicial foreclosure of mortgages without actual notice to junior lienors (giving notice merely by advertising or by posting notices), such foreclosures can also destroy government junior liens without the service of process prescribed by 28 U.S.C. § 2410. Senior liens are not affected by such foreclosures, see 59 C.J.S. 1030, Mortgages § 596(a). *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), held that in tax foreclosure by state and local bodies, advertising and posting are not constitutionally adequate and that notice by mail was the minimum required.

Kasdon v. G.W. Zierden Landscaping, Inc., 541 F. Supp. 991 (D. Md. 1982), held that, if there has been a foreclosure by a local taxing authority, the purchaser of a title in that proceeding cannot bring an action under section 2410 to clear title and remove a federal lien unless the state tax foreclosure included a "judicial sale," that is, a sale ordered by a court judgment. If the state tax foreclosure did not include a judicial sale, the plaintiff who seeks to remove a federal lien must describe his/her action as a foreclosure and seek in that action the judicial sale which was lacking in the previous foreclosure by the taxing authority.

4-4.542 Screening New Actions Under 28 U.S.C. § 2410

The following items should be checked before filing a responsive pleading in an action brought under 28 U.S.C. § 2410.

- A. Has the Attorney General been served by certified or registered mail?
- B. Has the United States Attorney been served?
- C. Does the summons allow 60 days to file a response?
- D. Does the complaint set forth the interest of the United States with particularity?
- E. If the action is a foreclosure, does the complaint seek a judicial sale?

All these are required by 28 U.S.C. § 2410; the requirements are jurisdictional. *See Messenger v. United States*, 231 F.2d 328 (2d Cir. 1956). There are no rulings as to exactly what detail will meet the requirement of "particularity," but usually the United States Attorney's prime need is to know the agency involved in order to secure a litigation report.

4-4.543 Removal of Actions Brought in State Courts

Usually the Commercial Litigation Branch of the Civil Division will leave the decision as to removal of actions brought under 28 U.S.C. § 2410 to the United States Attorney.

Removal of actions brought in state courts under 28 U.S.C. § 2410 is authorized by 28 U.S.C. § 1444. Removal is an absolute right and there is no right of remand in these cases. *See Vincent v. P.R. Matthews Co.*, 126 F. Supp. 102 (N.D.N.Y. 1954); *Hamlin v. Hamlin*, 237 F. Supp. 299 (N.D. Miss. 1964). Removal should be accomplished within thirty days of receipt of a copy of the initial pleading, whether by service of process or otherwise.

4-4.544 Responsive Pleadings

Informal requests to opposing counsel to correct deficiencies, such as those cited in USAM 4-4.542 will often obviate filing a preliminary motion. Answers should assert the interests of the United States and claim priority in accordance with the federal rule of "first in time, first in right." *See USAM 4-4.545*. If the government holds a first lien position and the client agency does not wish foreclosure of that lien, the answer should pray that the sale on plaintiff's lien foreclosure should be "subject to" the prior lien of the government. If the client agency desires a sale free and clear, the prayer in the answer should so state.

In some instances, the client agency may advise that it can find no identifiable interest in the property described in the complaint. Any disclaimer filed on this account should be carefully limited to the particular property and government agency described in the complaint. No disclaimer should be filed merely because the government's lien interest is subordinate to that of the plaintiff.

4-4.545 Priority of Liens

See Civil Resource Manual at 95.

4-4.550 Foreclosure of Government-Held Mortgages

Agencies which can safely foreclose security instruments nonjudicially under appropriate federal or state law, or pursuant to a power of sale in a deed of trust, should do so without referring such matters to the Department of Justice or the United States Attorneys for handling.

The Department of Housing and Urban Development (HUD) may also foreclose nonjudicially pursuant to the Multi-Family Foreclosure Act of 1981. *See* 12 U.S.C. § 3701 *et seq.*

If judicial foreclosure is required, suit should be brought in the name of the United States and filed in the United States district court, unless, for exceptional reasons, the Civil Division has authorized utilization of the state courts. An officer or agency of the United States should not be joined as a defendant. Rather, the respective claims and liens of the federal agencies affected should be set forth as claims of the United States. If difficulty is encountered in obtaining the prompt agreement of another agency to have its lien foreclosed in the same proceeding as that requested by the referring agency, contact the Commercial Litigation Branch.

Judicial foreclosure should be given priority attention. Client agencies claim a substantial dollar loss for each month of delay in completing foreclosure through the delivery of the Marshal's deed. Suit should be filed immediately, without making further demand on the mortgagor, unless additional notice is otherwise required under the mortgage or applicable statute or regulation. If the agency desires an order placing it in possession of the mortgaged property as "mortgagee in possession," or the appointment of a receiver, prompt action should be taken. Motions for summary judgment should be utilized when appropriate to expedite the entry of foreclosure decrees. In HUD multi-family foreclosures no compromise should be entered into with the mortgagor prior to liquidation of the security property without the express approval of the Civil Division. *See generally*, "Affirmative Multi-Family Mortgage Litigation: Foreclosure, Deficiencies, and Interlocutory Relief (Mortgagee-In-Possession and Receiver)" (1983).

4-4.600 Assistance on Questions of Foreign Law

The Office of Foreign Litigation of the Civil Division (202/514-7455) is often able to provide advice concerning questions of international or foreign law which may arise in connection with the trial in this country of civil cases. Such assistance should be requested as far in advance of trial as possible.

4-4.620 Extraterritorial Service

Guidance may be obtained from the Office of Foreign Litigation at (202) 514-7455, concerning the procedures to be followed in effecting extraterritorial service of process (including subpoenas directed to United States nationals or residents abroad under 28 U.S.C. § 1783). D.J. Memo No. 386, Rev. 3, July 1979, "Instructions for serving foreign judicial documents in the United States and for processing requests by litigants in this country for service of American judicial documents abroad."

4-4.630 Obtaining Testimony and Documents Abroad

Guidance in obtaining testimony and documents from abroad may be obtained from the Office of Foreign Litigation (202/514-7455).

The Office of Foreign Litigation is able in many instances to provide collateral assistance to United States Attorneys by instituting suits in foreign courts to collect debts owed to the United States and to attach foreign bank accounts or other property ancillary to such suits.

